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Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE-FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE.

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INTEREST OF THE AMICUS CURIAE.*

The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approxi-

* Consents of all parties to the Chamber's participation have been filed with this Court.

mately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation before this Court.*

The ultimate question presented in the instant case is whether a building trade union violates the antitrust laws by compelling an employer with whom it has no collective bargaining relationship to execute an agreement requiring it to cease doing business with nonunion employers and restricting the persons within the construction industry with whom the employer may do business to those who have a collective bargaining agreement with that union. However, as a necessary prerequisite to the resolution of this ultimate issue, this Court must determine the extent to which a labor union is immune from the antitrust laws and whether union conduct serves a "legitimate union interest" when that conduct is contrary to the policies of and proscriptions of the National Labor Relations Act, as amended.** And, necessary to the resolution of this fundamental question in the instant case,

* *E.g., Howard Johnson Company Inc.* v. *Detroit Local Joint Executive Board*, No. 73-631 (1974); *Super Tire Engineering Company, Supercap Corporation and A. Robert Schaevitz* v. *Lloyd W. McCorkle, et al.*, No. 72-1554 (1974); *Marco DeFunis and Betty DeFunis, his wife; Marco DeFunis, Jr. and Lucia DeFunis, his wife* v. *Charles Odegaard, President of the University of Washington, et al.*, No. 73-235 (1974); *Corning Glass Works* v. *Brennan*, No. 73-29; *N. L. R. B.* v. *Bell Aeraspace Company Division of Textron, Inc.*, No. 72-1598 (1974); *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B.* v. *The Boeing Company, et al.*, 412 U. S. 84 (1973); *N. L. R. B.* v. *Granite State Joint Board*, 409 U. S. 213 (1972); *N. L. R. B.* v. *Burns Int'l. Security Services, Inc.*, 405 U. S. 272 (1972); *N. L. R. B.* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 517 (1971); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970).

** 61 Stat. 136, 73 Stat. 519, 29 U. S. C. 151, et seq.

this Court is called upon for the first time to delineate and interpret the so-called construction industry proviso to Section 8(e) of the National Labor Relations Act. Specifically, the Court must decide whether the national labor policy, as expressed in the NLRA, permits an interpretation of the proviso that allows a building trade union to coerce from general contractors with whom the union has no collective bargaining relationship an agreement that concentrates in the union power to allocate the available market and thereby restrain free competition among economic units.

These questions are of particular concern to the Chamber's members since a significant number of them are users of construction products and services and are directly affected by designs which deprive them of the advantages of a competitive market that the antitrust laws are designed to foster.

Moreover, because of the ramifications of any decision rendered by the Court herein, in terms of the effect of that decision in clarifying and providing direction in areas of law that have invited misunderstanding, the Chamber is exceedingly interested that the questions presented herein by properly resolved. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court to aid its deliberations which might not otherwise be advanced by the parties.

SUMMARY OF THE ARGUMENT.

This case presents this Court with two questions of major importance to great numbers of affected employees, employers and unions. The first of these questions concerns the appropriate criteria to be utilized to determine when a labor union retains or forfeits its exemption from the prohibitions of the Sherman Act. The court below found that a union retains its antitrust immunity any time it engages in any conduct that promotes its own interests, notwithstanding that its activities may be interdicted by the National Labor Relations Act and alien to the nation's labor policy. In reaching its decision, the court below committed an analytical error of critical significance. Indeed, the court's analysis has been precisely and emphatically rejected in decisions of this Court.

This Court's decisions, instead, demonstrate that the activities of a union retain their exemption from the Sherman Act so long as they may be characterized as fostering a union's legitimate interests. A union's conduct may be so described only to the extent it comports with and is protected by national labor policy. This policy is reflected by the mandates, design and objectives of the Labor Act. Consequently, whenever a union engages in conduct that transgresses the dictates of the Labor Law the union thereby forfeits its exemption from the Sherman Act. This analysis is endorsed by the teaching in *Local 189, Meatcutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965), where this Court said that conduct protected by the national labor policy is *therefore* exempt from the Sherman Act. It follows that conduct proscribed by the Labor Act would lose its exemption. Otherwise, any union conduct regardless of its incompatability with the nation's labor policy could nonetheless be exempt from the Antitrust Act, a result rejected by this Court in *Jewel Tea*.

In this case the Respondent Union, through picketing, compelled an employer with whom it had no collective bargaining relationship and whose employees it did not represent to execute an agreement requiring that employer to cease doing business with non-union employers and restricted the persons within the construction industry with whom the employer could do business to those who had bargaining agreements with that Union. This conduct is proscribed by the Labor Act and therefore is not protected by the nation's labor policy. Section 8(e) of the Labor Act outlaws collective agreements between a union and an employer whose objective is to require an employer to restrict business relations to persons endorsed by the union. While a proviso to that Section immunizes certain construction industry agreements, this immunization is limited to agreements voluntarily entered into between parties enjoying a collective bargaining relationship. The agreement compelled by the Union in this proceeding did not meet these prerequisites, and was therefore not exempted from the proscriptions of Section 8(e). Accordingly, the Union, by engaging in this activity, and by otherwise engaging in conduct also violative of the labor laws and national labor policy has lost its antitrust immunity.

Having forfeited its Sherman Act immunity through its pervasive, anti-competitive unlawful conduct, the second question presented is whether the Union has also violated the Antitrust Laws.

The Union's conduct here has an indisputably deleterious effect upon free competition and produces an inescapable benefit for a favored class of employees. Consequently, the Union acting alone, by this conduct, has violated the prohibitions of the Sherman Act. Indeed, the conduct of the Union here effectuates a total control of economic power for the benefit of those employers whom it prefers, insulating them from market competition and depriving the public of the advantages of free trade. This is precisely the conduct interdicted by the Sherman Act.

ARGUMENT.

INTRODUCTION.

In the case before this Court, the Respondent Union, through picketing, has forced the Petitioner Connell, a general contractor, to execute an agreement which prohibits Connell from contracting with mechanical subcontractors for their services on any construction projects in the Dallas area unless those subcontractors are bound to a particular collective bargaining agreement with the Union. This agreement, its procurement and its maintenance, are not the product of collective bargaining between Connell and the Union, for there is no collective bargaining relationship between them. Nor does the Union have any organizational interest in Connell's employees because Connell employs no tradesmen of the category represented by the Union. Indeed, by the terms of the agreement coerced by picketing from Connell, the Union specifically disavowed any interest in representing Connell's employees.[1]

1. The terms of the agreement obtained from Connell, (Def.'s Ex. No. 9, App. 138-140), in relevant part, provide:

> "WHEREAS, the contractor and the union are engaged in the construction industry, and
>
> WHEREAS, the contractor and the union desire to make an agreement applying in the event of subcontracting in accordance with Section 8(e) of the Labor-Management Relations Act;
>
> WHEREAS, it is understood that by this agreement the contractor does not grant, nor does the union seek, recognition as the collective bargaining representative of any employees of the signatory contractor; and
>
> WHEREAS, it is further understood that the subcontracting limitation provided herein applies only to mechanical work which the contractor does not perform with his own employees but uniformly subcontracts to other firms;
>
> THEREFORE, the contractor and the union mutually agree with respect to work falling within the scope of this agreement that is to be done at the site of construction, alteration, painting, or repair of any building, structure, or other works, that if the contractor should contract or subcontract any of the aforesaid work falling within the normal trade jurisdiction of the union, said contractor shall contract or subcontract such work only to firms that are parties to an executed, current collective bargaining agreement with Local Union 100 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry."

Moreover, the Union's objective could not have been an organizational interest in the employees of the mechanical subcontractor on the job site picketed, nor to gain or preserve any work for its members on that site, since the mechanical subcontractor on that job site already employed members of the Union and had a collective bargaining agreement with it.[2] Plainly, the agreement obtained from Connell was an *in futuro* agreement, the effect of which is to limit the construction market available to Connell or any similar contractor to *only* those subcontractors signatory to a standard master labor agreement with the Union.[3] In this manner the Union sought a restriction on the relevant market and a restriction on competition through the elimination of an entire class of persons with whom Connell could do business.

The record here establishes that such a restrictive contracting agreement as that obtained from Connell was similarly obtained from several other general contractors in the Dallas area.[4] As a result of such extensive Union conduct, Connell and the other general contractors who have been forced to sign the subcontracting agreement are restrained from contracting for the services of subcontractors unless the latter enter into the labor agreement which the Union offers them. By such conduct, the Union necessarily has the power to control the entire construction market in the area and exclude therefrom all subcontractors who have not executed the master area agreement. Indeed, by entering into collective bargaining arrangements with certain

2. Record, at 20, App. at 61; Opinion of the Court of Appeals, 483 F. 2d 1154, 84 LRRM 2001, 2002 (CA 5, 1973).

3. Record at 44-49, App. at 72-77.

4. Record at 50, App. 77-78.

subcontractors and declining to do so with others, the Union retains the right to create a favored group of employers in the market. Thus, precluded from competition by the Union's conduct herein are the services of numerous mechanical contractors who ordinarily contract with the general contractors for specific units of construction. The market control exerted by the Union here effects the allocation of such unitized services, and is not directed to the elimination of competition based solely upon the wages paid for labor, for the Union's conduct eliminates all subcontractors having no bargaining relationship with the Union, *regardless* of whether Union wage standards are met by those subcontractors and *regardless* of whether the same or better wages are being paid pursuant to an agreement with a rival union.

Further, as noted, the Union has the power and may, at its option, simply refuse to offer any subcontractor the master agreement at all, preferring to allocate the available market to those contractors who utilize its present members, rather than to execute new agreements which would require it to accept as members the employees of previously nonunion subcontractors.

The Chamber submits and will establish that, divorced from any collective bargaining context and having no organization or work preservation objective, the Union's so-called subcontractors' agreement, its procurement and maintenance are activities and conduct which are contrary to the policies of the National Labor Relations Act, are violative of specific prohibitions of that Act, and therefore, serve no legitimate union interest. Accordingly, the Union's activities are not exempted from the proscriptions of the Sherman Antitrust Act.[5] Moreover, since the Union's conduct has the effect of substantially restraining the Dallas area market in construction services, the Union's non-exempt conduct constitutes an unlawful restraint of trade. This analysis is completely consonant with that of this Court in *Jewel Tea*.[5a] The

5. 15 U. S. C. Sec. 1 and 2.

5a. *Local 189, Meat Cutters* v. *Jewel Tea Co.*, 381 U. S. 676 (1965).

court below, however, failed to adhere to *Jewel's* teaching and this failure caused it to make an analytical error of critical importance. Thus, the court concluded that a union retains its antitrust exemption whenever it engages in any conduct promoting its own interests regardless of whether that conduct is contrary to the national labor policy and prohibited by the NLRA. Accordingly, the court did not consider the antitrust aspect and effects of the Union's conduct and dismissed this antitrust suit by concluding that since the Union's conduct herein was arguably an unfair labor practice, it was subject to exclusive regulation by the National Labor Relations Board under the NLRA.

In effect, the majority below failed properly to resolve this case by engaging in reasoning which segregated, rather than accommodated, the operation of the antitrust laws and that of the labor laws, in disregard of relevant teachings of this Court.

A.

THE ACTIVITIES OF A UNION MUST BE PROTECTED BY THE NATIONAL LABOR POLICY IN ORDER TO BE EXEMPT FROM THE SHERMAN ACT.

The resolution of the issues confronting this Court necessitates the accommodation of the nation's antitrust policy with the national labor policy.

A union retains its exemption from the proscriptions of the Sherman Act so long as its conduct may fairly be characterized as furthering a union's "legitimate interests". *Jewel Tea, supra.* Those interests remain "legitimate" only to the extent they are consonant with the national labor policy as expressed in the content and philosophy of the National Labor Relations Act. Accordingly, whenever a union's conduct violates the proscriptions of the labor laws it forfeits its antitrust exemption. Whether an antitrust violation results, becomes a function of the impact of the union's conduct on the marketplace. In the absence of a union's violation of the labor laws, it may retain its antitrust

immunity if the anti-competitive nature of its acts is outweighed by the benefits afforded its members, achieved through conduct comporting with the objectives of the labor laws. In sum, unions' Sherman Act exemption is lost either by conduct which violates the labor laws or as a consequence of the balancing of relative benefit and harm which reveals an undue restriction on competition.

This analysis is endorsed in *Jewel Tea*:

> "Thus the issue in this case is whether the marketing-hours restriction like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide arms-length bargaining in pursuit of its own labor union policies, and not at the behest of or in combination with nonlabor groups, *falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.*"

The "national labor policy" to which the *Jewel* Court referred consisted of the guarantees and duties contained in and inferrable from the National Labor Relations Act. It follows, since conduct *protected* by that Act was said to be "therefore" exempt from Sherman, that conduct *proscribed* by the Labor Act would "therefore" lose the exemption. Otherwise, no union conduct could fall outside the sanction of the "national labor policy", and the labor exemption could therefore never be lost, a conclusion specifically rejected by this Court in *Jewel Tea*. Further, with respect to union's anticompetitive conduct which does not affirmatively breach the labor laws, support for the foregoing analysis is similarly derived from the Court's decision in *American Federation of Musicians* v. *Carroll*.[6] There, in the absence of charges of otherwise unlawful conduct, the majority emphasized, quoting *Jewel Tea*:

> " '[t]he crucial determinant is not the form of the agreement —*e.g.*, prices or wages—but its *relative* impact on the product market and the interests of union members.' " (emphasis added)

6. 391 U. S. 99 (1968).

The notion that in such cases the accommodation of labor and antitrust policy compels the weighing of competing interests appears pointedly in Mr. Justice White's *Carroll* dissent:

> "On the other hand price competition, a significant aid to satisfactory resource allocation and a deterrent to inflation, would be substantially diminished if industry-wide unions were free to dictate uniform prices through agreements with employers. *I have always thought that this strong policy outweighed the legitimate union interest in the prices at which employers sell*, and until today I had thought that the Court agreed. (Emphasis added; footnote omitted)

The foregoing formulation represents a general scheme for the accommodation of this nation's labor and antitrust policies. The legitimacy of these principles derives support from this Court's prior decisions which have effected an accommodation of these national policies. Those decisions similarly demonstrate an emerging labor policy under which unions' secondary conduct, such as is involved in this case, is not exempt from the Sherman Act.

The History of the Accommodation Permitting Labor Unions' Exemption from the Antitrust Laws.

The history of labor's exemption reveals that it has never been extended beyond the scope of legitimate labor activities involving the working conditions of employees in a given bargaining unit; that it has depended on whether the unions' activities have affected the product market in interstate commerce; and that it has depended on an accommodation of the federal labor and antitrust policies.

a. Early Application of the Sherman Act; Loewe v. Lawlor.

Unions have claimed total exemption from antitrust liability without success since the Sherman Act was passed in 1890. In 1908, the United States Supreme Court held that unions were subject to the Sherman Act of 1890, if the union's purpose was

to prevent the interstate shipment of goods, *Loewe* v. *Lawlor*, 208 U. S. 274, 301 (1908). The *Loewe* case (often called the "Danbury Hatters" case) involved a nationwide (secondary) product boycott. The Court examined the Sherman Act and found that Congress intended the act to apply equally to all classes, and that labor unions were properly subject to the 1890 Act.

b. The Clayton Act of 1914; Duplex Printing Press v. Deering; the Second Coronado Case.

Congress granted labor partial exemption from the antitrust laws by virtue of Section 6 and 20 of the Clayton Act of 1914. 15 U. S. C. Sec. 17; 20 U. S. C. Sec. 52. The Supreme Court, however, held that Section 6 did not grant labor antitrust immunity "where . . . [unions] depart from normal and legitimate objects". The Court explained:

> "And by no fair or permissible construction can it [Section 6] be taken as authorizing activity otherwise unlawful, or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade . . ., and engage in an actual combination or conspiracy of trade", *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 469 (1921).

The *Duplex* case, like the *Loewe* case, involved a secondary product boycott. The Court held the boycott an unlawful combination in restraint of trade, finding also that Section 20 of the Clayton Act was not intended to apply either to unlawful acts or to secondary boycotts. The Court analyzed the language of Section 20, as follows:

> "The emphasis placed on the words 'lawful' and 'lawfully', 'peaceful' and 'peacefully', and the reference to the dispute and the parties to it, strongly rebut a legislative intent to confer a general immunity for conduct violative of the antitrust laws, or otherwise unlawful. The subject of the boycott is dealt with specifically in the 'ceasing to patronize' provision and by the clear force of the language employed the exemption is limited to pressure exerted upon a party to such dispute by means of peaceful and *lawful* influences upon neutrals." 254 U. S. 473 (Emphasis the Court's)

The effect of Section 20 of the Clayton Act was to exempt primary, but not secondary, disputes from the proscriptions of the antitrust laws and then only if the unions acted in a lawful and peaceful manner.

c. Apex Hosiery Co. v. Leader.

In *Apex Hosiery* v. *Leader*, 310 U. S. 469 (1940), this Court reaffirmed the principle that union activities were not exempt from the reach of the Sherman Act. *Id.* at 487-89. That case involved a primary strike the effect of which was to severely curtail the operations only of the primary employer against whom the strike was conducted. In that context the Court found that although the union's actions constituted a restraint on the interstate transportation of merchandise, there was an insufficient showing that such primary action resulted in a "restraint of trade or commerce" as required by the condemnations of the Sherman Act. *Id.* at 490. Thus, there was insufficient ". . . restraints to free competition in business and commercial transactions which tended to restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services . . ." *Id.* at 493. While the strike against Apex delayed the shipments of hosiery from the Apex plant in a fashion which severely impacted on interstate commerce, it had no effect on the price of hosiery on the market and thus did not constitute a restraint forbidden by the Sherman Act. *Id.* at 501. The critical distinction in *Apex* was the Court's recognition that collective bargaining necessarily impacts upon the primary employer' competitive market position but that such action, standing alone, does not have an actual or intended effect upon price competition. *Id.* at 504. It is precisely this analysis which, when applied to the facts of

the instant proceeding, confirms the Respondent's culpability under the sanctions of the Sherman Act. This conclusion is best buttressed by the *Apex* Court's reliance upon the "secondary boycott" cases wherein union liability under the Sherman Act had been found (*e.g., Loewe* v. *Lawlor, supra; Duplex Printing Press Co.* v. *Deering, supra;* and *Bedford Cut Stone Co.* v. *Journeymen Stonecutters Association*, 274 U. S. 33 (1927)) as distinguished from a purely primary strike which did not have the requisite impact upon the product market.

d. United States v. Hutcheson; Labor Immunity Depends on Accommodation of Labor and Antitrust Laws.

The year following *Apex* the Court decided *United States* v. *Hutcheson*, 312 U. S. 219 (1941), which did not disturb the above-noted holding or dicta in *Apex*. *Hutcheson* involved a criminal prosecution in a peaceful jurisdictional dispute between two unions over a work assignment by Anheuser-Busch. The losing union organized a strike among employees of contractors erecting a building for Anheuser and organized a boycott of the company's beer. Although the boycott would have been a violation of the Sherman Act under earlier precedent, the Court held the union's activities to be lawful under the Sherman Act. The Court reasoned that "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act, 29 U. S. C. 101-115, as a harmonizing text of the outlawry of labor conduct". *Id.* at 231.

The Court concluded that the union's "peaceful" activities were protected from antitrust prosecution by Section 20 of the Clayton Act, *Id.* at 233. Specifically, the Court held that Congress overruled *Duplex* when it enacted the Norris-LaGuardia Act in 1932, insofar as *Duplex* interpreted Section 20 of the Clayton Act as inapplicable to secondary disputes. Justice Frankfurter reasoned that the Norris-LaGuardia Act, which removed federal court jurisdiction to enjoin a secondary boycott evidenced a congressional intent that a peaceful secondary

boycott could no longer be a criminal violation of the Sherman Act.

Hutcheson's abiding importance, however, is in the rationale used by the Court to conclude that secondary boycotts were exempt from the Sherman Act. The Court chose to interlace and harmonize often-conflicting congressional policies in the fields of antitrust and labor. The Court found that Congress had removed secondary boycotts from the injunctive powers of the federal courts by the enactment of the Norris-LaGuardia Act, and it would be illogcial to hold activity expressly protected by Norris-LaGuardia subject to Sherman. If the same rationale be applied to the present case, this Court must conclude the defendants' activities, which are today prohibited by the Taft-Hartley Act, are not protected by the national labor legislation and therefore not exempt from the Sherman Act.

Congress in 1947 outlawed the secondary boycott, partially in response to and to overrule the Supreme Court's dictum in *Allen-Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797, 809 (1945), that the union's hot cargo boycott, without employer complicity, would be legal under the Sherman Act. The Taft-Hartley Act prohibition of the secondary boycott rendered unlawful that which before had been protected.

The required analysis of accommodating antitrust and labor legislation, post 1947, requires a holding contrary to *Hutcheson* and certainly contrary to the *Allen-Bradley* dictum referred to above. Since secondary boycotts lost congressional protection in 1947, accommodation of the labor and antitrust laws is unnecessary as the conduct is illegal under both laws, and unions engaging in such conduct are subject to Sherman Act liability if the requisite restraint on competition and the product market be shown.

This Court has confirmed this analysis in *National Woodwork Manufacturers* v. *NLRB*, 386 U. S. 612 (1967),[7] where it re-

7. That case held the hot cargo sanctions wrought by the Landrum-Griffin Bill's addition of § 8(e) to the National Labor Relations Act of 1959 were to be interpreted as prohibiting agreements with secondary, but not primary, objectives.

viewed the legislative history of the Taft-Hartley Act, and quoted the following Conference Report:

> "Under clause (A) strikes or boycotts, or attempts to induce or encourage such action, were made unfair labor practices if the purpose was to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with, employer B." 386 U. S. 631-2.

The Court concluded:

> "In effect Congress, in enacting § 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co., Id.*

Thus, as under *Duplex*, unions, acting alone conducting secondary boycotts prohibited under the labor law are not exempt from the proscriptions of the Sherman Act. That is, under *Duplex* and contrary to *Hutcheson*, union secondary conduct proscribed by the Taft-Hartley amendments is contrary to national labor relations policy. Moreover, as hereinafter discussed, Congress, by enacting the Landrum-Griffin amendments of 1959 (Pub. L. No. 257, 86th Cong. 1st Sess. 1959), reasserted the direction in labor policy taken in 1947, by taking greater measures to establish the invalidity of union secondary conduct under the NLRA.[8] Accordingly, union secondary conduct, proscribed by the national labor policy, is no longer exempt from the antitrust laws.

8. The 1959 amendments to the NLRA are discussed fully in Part B of the Chamber's brief herein.

B.

AS THE UNION CONDUCT HEREIN IS CONTRARY TO STATUTORILY DEFINED LABOR POLICY, IT CANNOT BE EXEMPT FROM THE SHERMAN ACT.

The Respondent Union herein urged, and the District Court below upheld the view, that the subcontractor's agreement at issue herein is lawful under the construction industry proviso to Section 8(e),[9] and that, accordingly, the agreement and the Union's conduct in exacting that agreement from Connell are consistent with national labor policy and are, therefore, sheltered from the antitrust laws. Accordingly, a full analysis of Section 8(e) and the nature and scope of the construction industry proviso, as set forth hereinafter, is required to show that such views are in error and that the proviso does not render the Union's conduct legitimate in terms of the exemption to the Sherman Act.

In 1959, Congress enacted Section 8(e) of the National Labor Relations Act to outlaw secondary agreements, commonly known as "hot cargo" clauses, which required employers to cease doing business with other persons with whom the union party to the agreement might have a labor dispute. However, Congress incorporated the proviso to Section 8(e) which permits "hot cargo" agreements with respect to job site work in the construction industry. This Court has never considered a case requiring the full delineation of this aspect of the Landrum-Griffin amendments, which, as the court below has indicated, is required for the orderly administration of the NLRA. (App. Pet. Cert. B 46, B 61-65)

As the Section 8(e) proviso constitutes an integral part of the statutory scheme governing collective bargaining, it is fundamental that the Act contemplates a bargaining relationship between parties who may permissibly enter into a hot cargo agreement. *Dallas Building and Construction Trades Council,*

9. 29 U. S. C. Sec. 158(e).

396 F. 2d 677 (D. C. Cir. 1968). Without that relationship the parties simply have no capacity, obligation or right under the National Labor Relations Act to contract with respect to labor relations, let alone the labor relations of some third party. Section 8(e) and its proviso was written into legislation which has as its synthesizing theme the promotion and regulation of collective bargaining. Sections 8(a)(5), 8(a)(2) and 8(b)(3)[10] make clear that the duty and right to bargain stem from the establishment by a union of its representation of a majority of the employer's employees in an appropriate unit. Indeed, much of the Act is concerned with protecting employees' rights from encroachment by illegitimate bargaining relationships. (*E.g.*, Sections 8(a)(2), 8(b)(1)(A), 8(b)(7) and 9(a).[11] Even Section 8(f), which permits pre-hire bargaining agreements in the construction industry, is narrowly limited to proscribe such agreements which infringe upon the rights of existing employees to authorize a bargaining relationship of their own choosing.

As a part of the Congressional design to adapt the bargaining process to various societal interests, Section 8(e) and the related secondary boycott provisions of the Act were enacted as a response to excesses *in collective bargaining*, pursuant to which disputes spread beyond a primary employer to embroil neutrals to the dispute. Specifically, as we show in Section 1) below, Congress enacted Section 8(e) to correct the "hot cargo" abuse that arose out of the growth of collective bargaining. Accordingly, in legislating the exemption applicable to the construction industry, Congress could hardly have intended to sanction such an agreement between parties who have no competence even to bargain collectively. Absent this prerequisite of a legitimate bargaining relationship between the parties to such a hot cargo clause, the proviso would be wrenched into a device for union organizational methods antithetical to Section 7 rights

10. 29 U. S. C. Secs. 158(a)(5), (a)(2), (b)(3).

11. 29 U. S. C. Secs. 158(a)(2), (b)(1)(A), (b)(7); 159(a).

of employees[12] and a means for achieving anticompetitive market restrictions without the justification of a legitimate bargaining interest. Such a result is incompatible with the overall design of the National Labor Relations Act, and cannot provide the basis for exemption from the Sherman Act.

1) The Construction Industry Proviso to Section 8(e) Does Not Exempt Agreements Between Parties Having No Mutual Bargaining Relationship.

While enacting in Section 8(e) a broad proscription against voluntary hot cargo agreements, Congress carved out an exception for agreements "between a labor organization and an employer in the construction industry" which relate to the subcontracting of work at the building site. Even this narrow exception which allowed agreements having a secondary object was premised on the need to protect the "pattern of collective bargaining" in this industry. (Volume II, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 at 1815). Collective bargaining furnished the touchstone for sanctioning secondary subcontractor's agreements which, by their definition, related to the union's objectives outside the primary bargaining unit. The Congressional rationale undergirding the proviso recognized that peculiar to the construction industry were special interests of the bargaining unit employees which justified an exception permitting voluntary agreements with secondary effects outside the unit. Nevertheless, it was clearly anticipated that these special interests would be advanced only by a union having the *right to bargain* for the employees directly affected.

In the building trades industry, employees of the different craft specialty contractors traditionally work together at a common situs. Because of this close relationship among employees

12. See the specific protections against imposed representation by a nonmajority union provided in Sections 8(a)(2), 8(b)(4)(C) and 8(b)(7) of the Act.

on the same site, and the potential created for disruption arising from incompatible interests, Congress recognized that trade unionists had a protectable interest in refusing to mingle with nonunion workers at a common work site. Accordingly, the proviso was "intended to be a measure designed to allow agreements pertaining to certain secondary activities of the construction site because of the close community of interests there . . .". *National Woodwork Manufacturers' Assn.* v. *N. L. R. B., supra,* 386 U. S. 612. Another expression of the rationale was given by the Third Circuit in *Essex County and Vicinity District Council of Carpenters* v. *N. L. R. B.,* 332 F. 2d 636 (1964):

> "This limited exemption [the proviso to Section 8(e)] was granted apparently in recognition of problems peculiar to the construction industry, particularly those resulting from sporadic work stoppages occasioned by the traditional refusal of craft unionists to work alongside nonunion men on the same project."[13]

Taking into account the continuity that the theme of collective bargaining gives to the different provisions of the Act, and the specific concern of Congress in the proviso to preserve bargaining patterns, Congress clearly intended the proviso as sanctioning an employee interest which was meant to be protected in the context of collective bargaining. As we show below (part b of this Section), the interest there sanctioned was not some institutional interest of construction unions in using restrictive site agreements as short-cut organizational devices to unionize sites or to acquire work already assigned to nonunion employees. Accordingly, the interest in site exclusivity protected by Section 8(e) proviso is that of the *employees.* The proviso contemplates that unions may protect such interest through "an

13. The same view of the proviso was taken by the Court of Appeals for the District of Columbia Circuit in *Drivers Local 695* v. *N. L. R. B.,* 361 F. 2d 547, 551 (1966), in stating:

> "The purpose of the Section 8(e) proviso was to alleviate the friction that may arise when union men work continuously alongside nonunion men on the same construction site."

agreement" with the "employer", and certainly the most natural vehicle for that purpose under the scheme of the Act is an established collective bargaining relationship, as Congress in fact contemplated.[14]

a. The Legislative History.

The legislative history of Section 8(e) illustrates that Congress intended a collective bargaining nexus between the employees having such legitimized interest in site exclusivity and the employer from whom a secondary site agreement is sought. Senator McNamara, in commenting on the construction industry proviso, stated:

> "The proviso permits plumbers and pipefitters local unions to bargain with *their* contractors relative to the contracting or subcontracting out of any fabrication of the pipe . . .". II. Leg. History of the Labor-Management and Disclosure Act of 1959, *supra,* at 1815. (Emphasis added.)

By the words, *"their contractors"*, Senator McNamara obviously meant plumbing and mechanical contractors who bargain with the unions representing their employees, and excluded from the application of the proviso a contractor who had no such bargaining relationship. Also, Congressman Frank Thompson,

14. The foregoing analysis does not depend on any distinction between primary and secondary objectives of the agreement sought and is consistent with the Board and court decisions holding that secondary site agreements are exempt in the construction industry. This analysis permits secondary site agreements, so long as they were between unions and employers having a *bona fide* collective bargaining relationship. For example, a contractor employing carpenters in the construction industry may agree with an A. F. L. union representing such employees that the laborers' work, or any and all other craft specialty work, shall be subcontracted only to those contractors employing A. F. L. union members. Such agreement would be secondary because it relates directly to labor relations elsewhere; also, it is exempt under the Section 8(e) proviso because it promotes the Congressionally recognized interest that the contractor's unionized employees have in site exclusivity. *National Woodwork Manufacturers Assn.* v. *N. L. R. B., supra,* 386 U. S. 612.

Jr., a member of the Conference Committee, in analyzing the proviso's effects upon prefabrication agreements in the construction industry, made the same point in stressing that the subject matter was one "to be covered by the collective bargaining agreement", and that the proviso permitted employees "to *bargain with their contractors* relative to the contracting or subcontracting out" of work.[15] (Emphasis added)

Moreover, in considering the proscriptions in the body of Section 8(e), Congress was concerned principally with the abuses of the collective bargaining process by which unions were able to obtain hot cargo clauses. From the proceedings on the floor, it is clear that Congress envisioned the bill to purge the collective bargaining process of attempts to obtain hot cargo provisions. Congressman Thompson of New Jersey and then-Senator John F. Kennedy of Massachusetts prepared a joint analysis of the pending bills, which summarized this concern as follows:

> "Some time after the Taft-Hartley Act became law the Teamsters Union began to exploit this distinction by the device of hot cargo clauses. *During negotiations with trucking firms, the Teamsters would demand that any*

15. The full context of Congressman Thompson's commentary is as follows:

> "Many building trade unions' officials advise me that there have been numerous questions submitted to them both by local union officers as well as contractors asking the question whether or not their particular subcontracting clauses in their existing agreements are covered by the proviso to section 8(e) of the new Labor Management Reporting and Disclosure Act of 1959. More particularly, the question has arisen by the Plumbers and Pipefitters International Union based on what is known as their fabricating clause.
>
> The proviso above set out embraces and covers all forms of contracting or subcontracting *in agreements between building and construction contractors and building trades unions* with respect to work to be done at the jobsite. The pipe installed on the jobsite must be cut, treated and fabricated prior to installation. This is done at jobsite in some jobs or at the shop of the employer, or may be subcontracted by the contractor.

> *collective bargaining agreement that he would not truck or require his employees to handle any freight which was hot or unfair because it came from an employer engaged in a labor dispute.*
>
> * * * * *
>
> "Unfortunately there are a good many cases in which the Teamsters, without any inducement of employees, is often able to persuade the secondary employer not to carry the goods and not to require his employees to handle them. *It is very hard for a trucking firm either to resist the Teamsters' demand for a hot cargo clause in collective bargaining, when the price of resistance would undoubtedly be a strike for still higher wages,* or to refuse to live up to the contract once it has signed it, when the cost of noncompliance would undoubtedly be the Teamsters' insistence that the contract had been terminated by the violation, *thus freeing the union to present new demands in collective bargaining.*
>
> * * * * *
>
> "Section 707 of the Senate bill sought to correct this by outlawing hot cargo clauses and making existing clauses unenforceable. The bill also makes *it an unfair labor practice for a union to request such a clause in collective bargaining.*"[16] (Emphasis added.)

This is all a question to be covered by the collective bargaining agreement.

The proviso permits plumbers and pipefitters local unions *to bargain with their contractors* relative to the contracting or subcontracting out of any fabrication of the pipe or the parties may agree that it may be done at the jobsite." II Leg. Hist. at 1816(2)(3). (Emphasis supplied)

To the same effects are the remarks of Senator McNamara, II Legislative History at 1815(2). The words "their contractors" obviously meant mechanical contractors who bargained with the unions representing their employees. By stressing the collective bargaining relationship and by carefully excluding from their explanation any broad reference to stranger contractors, these statements clearly show that the proviso did not apply to a union and contractor who had no right to enter upon a collective bargaining relationship.

16. Section 707 of S. 1555 would have made it a breach of good faith bargaining to request or negotiate for a hot cargo clause. However, when the bill emerged from the Conference Committee, the

Legislative History of the Labor-Management and Disclosure Act of 1959, at 1707-1708. See, also, *Id.* Vol. I, at 779; Vol. II at 1079 (2-3), 1197 (3), 1432, 1858 (1).

As the body of Section 8(e) was born out of concern for the subversion of the bargaining process, so Congress intended that the exception created in the construction industry with respect to agreements pertaining to site work would be an exemption permitted only in the context of collective bargaining. This requirement for a collective bargaining nexus accommodates both the interest of union employees in site exclusivity, as Congress intended, and the rights of unrepresented employees protected by the statutory scheme of voluntary collective bargaining. Congress never contemplated that secondary site agreements obtained outside of the context of an established bargaining relationship be used as a tool to exclude open shop contractors from the marketplace, or as a device to organize an entire industry from the top down.

b. The Statutory Scheme.

Only by restricting permissible site work agreements to those entered into between an employer and *a union representing his employees,* may the foregoing Congressional rationale be effectuated in a manner consistent with the statutory scheme of the NLRA. For, if construction trades unions are free to exact such exclusive site agreements from stranger contractors, whose employees may be nonunion, or when all employees concerned at the site may be nonunion, the Congressionally recognized interest in site exclusivity is not served in any legitimate fashion. Certainly, such contractor's employees are not well served as they have no interest whatsoever in exclusively reserving the

proviso had been pared, presumably because it was superflous. Nevertheless, this history illustrates that Section 8(e) was cast in a matrix of legislation designed to regulate the collective bargaining process, from which it follows that the construction industry proviso was designed to function singularly within the confines of the collective bargaining process.

site for the use of union workers. To the contrary, such exclusivity is antithetical to their own interests because the Section 7 rights of these employees and all other nonunion employees already at the site will be subverted by an arrangement which forces them to join the union as a condition to retaining their jobs or if the union chooses not to admit them to membership excludes them from the job site altogether.

A reading of the proviso to permit this result flies in the face of the stated policy of Section 1 of the NLRA, 29 U. S. C. 151, to "encourage . . . collective bargaining" by "protecting the exercise by workers of full freedom" to designate "representatives of their own choosing." To implement this policy, the various sections of the Act taken together regulate the establishment of the bargaining relationship and define the scope of the matters over which parties to such a legitimate bargaining relationship may be required to bargain. Thus, Section 8(a)(5) and Section 9 impose the duty to bargain only where employees select a union as their representative. Section 8(a)(2) and Section 8(b)(1)(A) prohibit bargaining by employers and unions where the employees have not freely selected the bargaining representative.[17] Section 8(b)(7) disallows coercive and other undesirable organizational methods, such as blackmail picketing where employees have selected another union, or where the employees have within the previous twelve months rejected union representation, or where the union's picketing exceeds a reasonable length of time. In the construction industry, Section 8(f) permits pre-hire agreements, but only with the limitations that preserve the employees' rights under Section 8(a)(2) against an unwanted union and which accord them a specific right, not subject to the usual contract bar rules, to a Labor Board election to oust the union.

This whole structure of the Act is directed toward preserving the integrity of the process by which the collective bargaining

17. *Int'l. Ladies' Garment Workers' Union* v. *N. L. R. B., (Bernard-Allman Texas Corp.),* 366 U. S. 731 (1961).

relationship is established, and toward defining the legal nexus for bargaining. In circumstances such as those here, where a union having no such legitimate bargaining relationship seeks a proviso agreement from a stranger, the whole structure and policy of the Act will be thwarted, if it may be done with impunity.

For, in effect, the Union is appropriating the Section 8(e) proviso as a statutory mandate to conduct organizational campaigns in the construction industry by an agreement with strangers which will insure the unionization of the sites affected by compelling the employees of all subcontractors there to become union members. Alternatively, it will deny work at such sites to the subcontractors' employees based upon their lack of union membership. Such a device procures this result by circumventing the whole panoply of statutory provisions protecting the employees' rights to freely select a bargaining representative of their own choosing. Moreover, it constitutes a method of imposing organization upon employees in a whole industry rather than unit by unit; and is a method of setting the terms and conditions of employment upon an industry-wide basis, rather than unit by unit. Such a construction of the proviso would wrench the proviso to Section 8(e) from its moorings in the statutory scheme of promoting free collective bargaining.

Only a construction of the proviso which requires the bargaining nexus as a justification for the union to assert its members' interest in site exclusivity will comport with the statutory scheme. Without some clearer legislative expression, it cannot be reasoned that Congress intended the Section 8(e) proviso to be read in a way that would subordinate the statutory rights of unrepresented employees or employees represented by a rival union to the institutional interests of a union in blatant work acquisition or in organizing from the top down. Such an anomaly may only be avoided by adopting a construction of the proviso which flows naturally from the language of Section

8(e), the legislative history and the Congressional rationale: that is, that the interest of union workers in site exclusivity may be vindicated only through an agreement where there is already existing a bargaining nexus between their union and their employer.[18]

Where no such nexus exists, an exclusive site agreement is not saved by the proviso, and more, it violates Section 8(e). As Congress did not intend to exempt from Section 8(e) secondary site agreements between *strangers* to collective bargaining, it follows that such agreements are prohibited by that section. Clearly, they represent the type of abuses that the proscriptive body of Section 8(e) interdicted.

As Congressman Griffin stated in the Floor debates when he urged acceptance of his amendment, now Section 8(e), "Our substitute would ban *all* hot cargo agreements" (Emphasis added). II Leg. History 1568. To the same effect, see II Leg. History 1518. Since the secondary site agreement herein does not fall within the narrow exception stated in the proviso to Section 8(e), therefore, due regard for the clear legislative intent compels the conclusion that it is within the class of *"all* hot cargo agreements" prohibited by the body of Section 8(e).

Accordingly, not only is the agreement herein outlawed by Section 8(e), but also the picketing by the Union to exact such an

18. Also, any broader rule would be incompatible with the secondary boycott statutes and would permit what was intended as a limited exception to Section 8(e), to swallow the rule of *N. L. R. B.* v. *Denver Building and Construction Trades Council*, 341 U. S. 675 (1951). Under the holding of that case, Section 8(b)(4)(B) prohibits economic coercion of the general contractor for the object of forcing him to exclude nonunion subcontractors from a construction site. Should exclusive site agreements between strangers to collective bargaining be permissible under Section 8(e), and picketing to obtain them be permitted under Section 8(b)(4)(A), the result disallowed in *Denver Building* could be lawfully achieved by indirection and that holding circumvented. There would be no limitation upon which contractors in the construction industry could prevent such results, and a union could permissibly picket for that end. The complete evisceration of *Denver Building* in this manner is wholly inconsistent with the express view of Congress that in amending the secondary boycott statutes by adding Sections 8(e) and 8(b)(4)(A) it was closing loopholes rather than opening new ones.

agreement from Connell is proscribed by Section 8(b)(4)(A) of the Act. That provision interdicts picketing of

> "any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> > "(A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by section 8(e)."

Therefore, as the foregoing analysis demonstrates, the Union errs in its contention that both the site agreement with a stranger to collective bargaining and its conduct to obtain such agreement were privileged under the labor statutes. The showing herein that such conduct indeed violated the NLRA, deprives the Union of any reliance upon the labor statutes as a basis for asserting a Clayton Act exemption.

2) In Addition, the Proviso to Section 8(e) Exempts Only Exclusive Site Agreements Which Are Voluntary: Consequently, Section 8(b)(4)(A) Prohibits Picketing to Obtain Such Agreements in the Construction Industry.

The foregoing section of this brief demonstrated that Respondent Union's picketing to secure a hot cargo contract from an employer with whom no collective bargaining relationship existed constituted proscribed and unlawful conduct beyond the scope of a union's legitimate endeavor. That argument focused on the absence of the required bargaining relationship. Independent of that consideration, however, the Union's conduct is otherwise unlawful and illegitimate. Even without regard to the absence of a collective bargaining relationship, the Union's picketing to obtain a site agreement is banned by Section 8(b)(4)(A) of the NLRA. (And for still different reasons, explicated in part 3, *infra*, the same conduct also violates Section 8(b)(4)(B).) For this additional reason, the Union's coercion of Connell to obtain an agreement restricting competition, falls outside the carefully drawn parameters of national

labor policy marked out by the labor statutes, and accordingly such conduct is not antitrust exempt.

Sections 8(e) and 8(b)(4)(A), prohibiting voluntary hot cargo agreements and union coercion to obtain such agreements, were part of the 1959 amendments Congress enacted to close loopholes in the existing secondary boycott statutes. The specific situation to which Sections 8(e) and 8(b)(4)(A) were addressed was the *Sand Door*[19] case, in which the Court indicated that while picketing to enforce a hot cargo agreement was unlawful, such an agreement voluntarily entered into was not proscribed. In response thereto Congress passed Section 8(e) which outlawed such voluntary agreements generally.

However, Congress made an exception in the construction industry. It included in Section 8(e) a proviso which exempted such agreements relating to work to be performed at a construction site, as per *Sand Door*, so long as they were entered into voluntarily. The committee reports and the explanations given in the floor debates of the construction industry proviso uniformly demonstrate that the proviso was intended to preserve in that industry the status of the law existing prior to 1959, which sanctioned only voluntary agreements. In this regard, the House Report on the Conference proceedings explained:

> "The committee of conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case (*Local 1796, United Brotherhood of Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958)). To the extent that such agreements are legal today under section 8(b)(4) of the National Labor Relations Act, as amended, the proviso would prevent such legality from being affected by section 8(e). The proviso

19. *United Brotherhood of Carpenters* v. *N. L. R. B.*, 357 U. S. 93 (1958).

applies only to section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). * * * The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project.

* * * * *

It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract."

H. Rep. No. 1147 on S. 1555, pp. 39-40, I Leg. Hist. 942-943; See, also, Sen. Kennedy's remarks, II Leg. Hist., p. 1433.

Analysis of the then existing law, of which Congress must be presumed to be aware and which it disclaimed any purpose to change, conclusively supports the proposition that Congress intended to prohibit the use of coercion to secure subcontractors' agreements such as are involved herein. Prior to 1959, picketing of any person to obtain a hot cargo agreement violated Section 8(b)(4)(A), now Section 8(b)(4)(B). It was held that the effect of such an agreement was a proscribed "cease doing business" object under that statute. *Bricklayers, Masons and Plasterers International Union of America, AFL-CIO (Selby-Battersby & Co.)*, 125 NLRB 1179 (1959). See, also, *Texas Industries, Inc.*, 112 NLRB 923 (1955), *enf'd.*, 234 F. 2d 296 (CA 5, 1956); *Bangor Bldg. Trades Council*, 123 NLRB 484 (1959), *enf'd.*, 278 F. 2d 287 (CA 1, 1960). Indeed, the rationale and holding of *Sand Door* logically led to that result; or as the N. L. R. B. said, in construing the pre-1959 law: "That proposition seems implicit in the legal analysis provided by the Supreme Court in its *Sand Door* opinion."[20] In holding that picketing to force a cessation of business between employers was not saved by the existence of a hot cargo agreement, the Court in *Sand Door* was concerned that the

20. *Local 383, Construction, Production and Maintenance Laborers (Colson and Stevens Construction Co., Inc.)*, 137 NLRB 1650, 1651 (1962), *enf'ment. denied*, 323 F. 2d 422 (C. A. 9, 1963).

neutral employer retain his freedom of choice with respect to participating in a secondary boycott to which he had contractually agreed at an earlier time. The Court stressed the consideration that:[21]

". . . the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress has condemned. It may have been forced upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision to justify conduct that in the absence of such a provision would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers."

From this it follows that if transmitting proscribed pressures through the contractual provisions to the moment of boycott were prohibited, those same pressures, when applied at the inception of the contract, must likewise be proscribed by the statute. For otherwise, the initial coercion to obtain a general agreement to boycott others may be effectively transmitted to the moment, at a later date, when the employer honors this agreement and the very result Congress intended to prohibit will be realized through circumvention. In short, seeking an agreement to boycott others in the future was an object proscribed by Section 8(b)(4)(A) prior to 1959. By adopting the pre-existing law, Congress exempted only *voluntary* agreements in the construction industry.

That such was precisely the intent of Congress is further supported by the authoritative remarks of Congressman Barden, Chairman of the House Labor Committee and a member of the Conference Committee. In presenting the Conference Report to the House, Congressman Barden explained:

21. *Sand Door, supra*, 357 U. S. at 101.

> "The first proviso under subsection (e) of section 704 permits the making of *voluntary* agreements between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done directly on the site of construction." II Leg. History 1715. (Emphasis supplied.)

Accordingly, the present Section 8(b)(4)(A) must be read as condemning picketing in which the object is to obtain the kind of clause dealt with by Section 8(e).

Although initially the NLRB held, in accordance with the above analysis, that the proviso to Section 8(e) did not save picketing to obtain such an agreement from the prohibition of Section 8(b)(4)(A), the subsequent reversal by the Board of its views effectively pretermitted consideration of the question by this Court. On first impression, the Board in *Local 383, Construction, Production & Maintenance Laborers Union (Colson and Stevens Construction Co.)*, 137 NLRB 1650 (1961), held such conduct prohibited, based upon the clearly expressed legislative intent to preserve the pre-1959 status of the law in the construction industry. However, three appellate courts disagreed and held that literally construed, Section 8(b)(4)(A) only barred picketing to obtain an agreement which violated Section 8(e), and since the proviso exempted such agreements in the construction industry from Section 8(e), Section 8(b)(4)(A) did not apply.[22] Thereupon, the Board reversed its earlier *Colson and Stevens* decision and acquiesced in the contrary view. *Northwestern Indiana Building and Construction Trades Council (Centlivre Village Apartments)*, 148 NLRB 854, *enforcement den.*, on other grounds, 352 F. 2d 606 (C. A. D. C., 1965).

22. *Construction, Production & Maintenance Laborers Union, Local 383, et al.* v. *N. L. R. B. (Colson and Stevens Construction Co.)*, 323 F. 2d 422 (CA 9, 1963); *Essex County and Vicinity District Council of Carpenters and Millwrights, United Brotherhood of Carpenters, etc. (Associated Contractors of Essex County, Inc.)* v. *N. L. R. B.*, 332 F. 2d 636 (CA 3, 1964); *Orange Belt District Council of Painters No. 48, AFL-CIO, et al. (Calhoun Drywall Co.)* v. *N. L. R. B.*, 328 F. 2d 534 (CA DC, 1964).

As a result, no other court of appeals was called upon to review the issue, and nearly all avenues for obtaining this Court's consideration of the matter were effectively foreclosed. As noted in the opinions below (App. Pet. Cert. B.-46, B.-60) the General Counsel, who has final authority with respect to issuing complaints, believes himself bound by the Board's *Centlivre* holding and will not institute proceedings based upon such picketing as occurred here. Consequently, as the likelihood is quite remote that this issue will again come before the Court, it ought to use this opportunity to address the issue of whether the proviso sanctions only site agreements which are entered into voluntarily.

The court below vainly admonished the Board's General Counsel to seek a Board disposition of the precise issue here, concerning the legality under the proviso of picketing to obtain a hot cargo agreement from a stranger contractor. (App. Pet. Cert. B. 46.) For, as both the court and the dissent below agreed, the question has an important impact upon labor relations in the construction industry. (App. Pet. Cert. B. 46, 61-65.) Of equal significance to the industry is the scope of Section 8(b)(4)(A) in relationship to the Section 8(e) proviso. The Court should speak to that question and, overruling the Board's *Centlivre* decision, implement the legislative intent to authorize only voluntary agreements between parties having a collective bargaining relationship.

For the reasons that there were neither a voluntary agreement here nor, as urged in Section B, 1) *supra*, a collective bargaining relationship, the Union's conduct violated the NLRA, and was not conduct sanctioned by the Landrum-Griffin amendments. Accordingly, the Union has no basis under the Labor Relations Act for the formulation of any theory of exemption from the antitrust laws.

3) Even Under the Analysis Suggested by the Court Below That the Union Violated Section 8(b)(4)(B) Rather Than Section 8(e), Its Conduct Was Not Antitrust Exempt.

In the majority opinion below, the court suggested that at the very least, the coercion directed at exacting from Connell an agreement boycotting all area contractors who did not recognize the union or its affiliates, might well constitute a secondary boycott in violation of Section 8(b)(4)(B) of the Act. (App. Pet. for Cert. B.-39 to B.-45.) Such a characterization of the Union's conduct would comport with *Shelby-Battersby*,[23] and the rationale of *Sand Door* as discussed in Section B, 1) above. *Supra*, pp. 30-31. Such an analysis leads again to the conclusion urged here, that labor policy expressed through the labor statutes affords the Union's conduct no shelter from its antitrust consequences.

In summary, the thesis of the opinion below is that Section 8(e) does not at all regulate hot cargo agreements in which one party is not the immediate "employer" of employees represented by the union. Although the contractor in such an instance is not an "employer" within the meaning of Section 8(e), he is a "person" protected by Section 8(b)(4)(B), such that if the union pickets to require him to agree to "cease doing business" with others, it violates Section 8(b)(4)(B) of the Act.

Thus, as the court below reasoned, the proviso to Section 8(e) exempts only "an agreement between a labor organization and an *employer*." (Emphasis supplied.) The term "employer", as used in the statute, refers to the immediate employer of those employees represented by the union seeking the agreement. Therefore, still according to the lower court, the construction industry proviso does not apply to persons such as Connell who have no workers that the union represents. On the other hand, neither does the proscriptive portion of Section

23. *Bricklayers, Masons and Plasterers International Union of America, AFL-CIO (Selby-Battersby & Co.), supra*, 125 NLRB 1179.

8(e) apply because it contains the same term, "employer" and prohibits only an agreement with such an "employer". The result suggested below, therefore, is that read together Section 8(e) and the construction industry exemption neither prohibit nor permit such agreements. Section 8(e) simply does not govern. Therefore, Section 8(b)(4)(A), which regulates picketing to obtain "any agreement which is prohibited by Section 8(e)", is inapplicable as well.

However, since the object of the Union's picketing to obtain such an agreement is clearly secondary, it may be fairly inferred the Congress did not intend such conduct to go wholly unregulated. Indeed, that conduct falls precisely within the proscription of Section 8(b)(4)(B). See *Centlivre, supra*. That section prohibits economic coercion of "any person" with an object of forcing or requiring such person to cease doing business with any other party. Clearly, Connell falls within the broad definition of "any person". Moreover, the union's object in seeking a subcontractor's clause was to force Connell to cease doing business with others. Indeed, the secondary effect of such an agreement is broader and more pernicious than picketing to disrupt a business relationship with a single subcontractor. The Board has so held. *Bricklayers, Masons and Plasterers International Union (Selby-Battersby & Co.)*, 125 NLRB No. 115, 45 LRRM 1233 (1959). See *Sand Door, supra*, 357 U. S. 93, and the analysis of the rationale of that case as applied to picketing to obtain a hot cargo agreement, *supra*, at pp. 30-31.

Therefore, whether the Union's conduct here is characterized as unlawful under Section 8(b)(4)(B), Section 8(b)(4)(A), or Section 8(e), or all of them, it is clear that no element of statutory labor policy sanctions its direct and widespread anticompetitive effect upon the product market. Where, as here, the Union's conduct is not protected by the labor statutes, and indeed is specifically interdicted, it does not qualify as furthering legitimate union interest as defined by national labor policy. It is not antitrust exempt.

C.

THE UNION'S SECONDARY CONDUCT HEREIN, PROSCRIBED BY THE NATIONAL LABOR RELATIONS ACT, AS AMENDED, HAS A SUBSTANTIAL EFFECT OF RESTRAINING THE PRODUCT MARKET AND VIOLATES THE SHERMAN ACT.

The preceding sections have demonstrated that the Union's conduct herein is in violation of the interdictions of the Labor Act, is therefore contrary to the national labor policy, and results in the Union's forfeiture of its exemption from the Sherman Act. Under such circumstances, as *Jewel Tea, supra,* teaches, the Union, acting alone, can violate Sherman if its actions restrain trade for the derivative benefit of a favored employer class (as shown in the Introduction to this brief as well as in this section, *infra*) and such action has a significant and deleterious effect on free competition in a fashion proscribed by the antitrust law. With regard to this latter consideration, this Court has historically analyzed the market effects of union conduct in order to determine whether or not an antitrust violation exists.

Thus, Mr. Justice Stone, speaking for the Court in *Apex*, examined the market effects in both *Coronado* cases and *Heckert*,[24] and concluded that a substantive Sherman Act violation lies where a union's activities are "directed at control of the market" and are "so widespread as substantially to affect it." *Apex, supra,* at 506.

Mr. Justice Stone applied the "rule of reason" historically applied in both labor and nonlabor cases brought under the Sherman Act. He reasoned that union activities of a purely "local" nature in terms of their breadth and effect, though not immunized from antitrust proscription, are not violations of the

24. *United Mine Workers* v. *Coronado Co., (Coronado I),* 259 U. S. 344 (1922); *United Mine Workers* v. *Coronado Co., (Coronado II),* 268 U. S. 295 (1925); *United Leather Workers* v. *Heckert,* 305 U. S. 457 (1924).

Sherman Act because of their minimal control of and impact upon the market,[25] but union conduct which has a substantial effect upon the market or "otherwise to deprive purchasers or consumers of the advantages which they derive from free competition" violates the Sherman Act. *Apex, supra,* at 501.

Thus, a work jurisdictional dispute wherein a building trades union pickets to obtain work previously assigned to a different trade union, though a secondary boycott proscribed by the NLRA under Section 8(b)(4)(D), is confined to the immediate parties to the dispute. While such a dispute involves the rights and interests of those parties and the immediate job site, its effect on the industry and the market is minimal. It is local.

Similarly, where a union has a dispute with a single subcontractor and pickets a job site to bring pressure to bear on a neutral general contractor in order to gain concessions or an agreement from the subcontractor, while the union's conduct violates Section 8(b)(4)(B) of the NLRA, the dispute, by its very nature, is "local", affecting only the rights and interests of those persons or parties embroiled in the dispute. The overall effect of such a dispute on the competitive market, in terms of trade, restraint and destruction of competition, are insubstantial compared with the effect of the Union's conduct herein.

Here, by design, the Union effectively controls the business relationships between general contractors and mechanical subcontractors for the entire Dallas area construction industry. By the device of the subcontractors' agreement, the Union has excluded all open shop contractors and contractors having labor agreements with other unions from the marketplace. Further, this device enables the Union to allocate the available market to members of the local contractors' association or to any contractor whom it chooses, to the exclusion of all others. The Union is under no obligation to sign a collective bargaining agreement with an employer unless the Union represents a

25. *Apex, supra,* at 512.

majority of his employees, and no provision in the Labor Act compels or requires the Union to accept new members.[26] Therefore, the Union may simply refuse to offer the standard area agreement to the mechanical contractors whom it does not favor, offer it to those it does, and thereby allocate the available market.

Applying Mr. Justice Stone's analysis to the effects of the "local" type of secondary dispute, the restriction upon free competition is isolated and slight. In the instant case, however, the inescapable effect of the Union's design results in a substantial restraint of competition. Indeed, as the record below discloses, the Union's design herein effectuates total control and complete concentration of economic power in its own hands *to the benefit of those contractors it prefers* and deprives the consumer and purchaser of the advantages of free trade.[27] Such conduct constitutes, in the words of *Jewel Tea*, "an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act." (381 U. S. at 693)

The Respondent has set upon a course which substantially restrains the economic freedom of the marketplace in the nation's largest industry. Moreover, as has been shown, it has

26. Section 8(b)(1)(A) of the NLRA permits unions to prescribe their own rules for the acquisition and retention of membership. Thus, a union is under no obligation to accept new members and does not violate the NLRA by its refusal to do so.

27. The Union has never contended that its conduct herein does not have this anticompetitive effect. Rather, its argument is that the Labor Act displaces the Sherman Act as the exclusive body of substantive law under which the consuming public's interest in a free and competitive marketplace should be protected and the Union's conduct regulated. In effect, the Union's argument for displacement amounts to no more than the argument for exclusive regulation under the NLRA which was conclusively rejected in *Jewel*.

In *Jewel*, one of the questions considered by the Court was:

> "Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board." 381 U. S. at 684.

concentrated this economic power and control in the hands of a few and has done so contrary to the national labor policy. The ramifications of approving such activity, in terms of the effect that this Court's approval would have on the competitive economic system and the beneficient advantages that the public as a whole derives from that system, are manifest. If this Court should permit one local union, as is Respondent herein, to exercise such potential control of the market in one area of the country, then certainly large national construction trade unions would be permitted to exercise control of the entire construction marketplace throughout the whole nation by the same devices. The Chamber submits that such unfortunate results, contrary to both labor and artitrust policies, should be avoided by this Court.

The Court flatly rejected the notion, raised again herein that conduct within the regulatory scope of the NLRA would not be a violation of the Sherman Act. *Id.*, at 686-7.

Although *Jewel* and *United Mine Workers* v. *Pennington*, 381 U. S. 657 (1965) have engendered wide scholarly debate and disagreement, the commentators are in agreement with the Court in the respect that union conduct, if violative of the antitrust laws, should, as before *Jewel*, continue to be regulated under the Sherman Act. *E.g.*, DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705, 725 (1972); Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws*, 33 U. Chi. L. Rev. 659, 696-701 (1972).

CONCLUSION.

For the reasons stated herein, together with those contended by the Petitioner, the Court is respectfully urged to reverse the court below.

Respectfully submitted,

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